FEB 6 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 668

CASH COLE, individually and as an officer and director of Bayview Realty, Inc., an Alaskan corporation and Fairview Development, Inc., an Alaskan corporation, Bay-View Realty, Inc., an Alaskan corporation and Fairview Development, Inc.,
Petitioners,

vs.

FAIRVIEW DEVELOPMENT, INC., an Alaskan corporation; NELSE MORTENSEN, CLIFF MORTENSEN and FRANK V. HENDERSON, individually and as directors and stockholders of Fairview Development, Inc., and for and on behalf of all other stockholders of Fairview Development, Inc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

BAILEY E. BELL,
213 Central Building, Anchorage, Alaska,
Attorney for Petitioners.

WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Anchorage, Alaska,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray that a writ of certiorari be issued to review the judgment

banks, which lease was taken in the name of the new corporation. There was a corporation known as Nelse Mortensen-Alaska, Inc., a Washington state corporation. The stock in Fairview Development, Inc. was divided fifty per cent to Bay View Realty Company, four hundred and fifty shares to Bay View Realty Company, and four hundred and fifty shares were held by the Nelse Mortensen-Alaska partnership.

A federal housing program was advanced by Cash Cole, who was successful in procuring a commitment for an insured F.H.A. loan of $3,080,000 for the construction of the muchly needed apartments.

Nelse Mortensen-Alaska, Inc. entered into a contract to build these apartments for $3,080,000. The Nelse Mortensen-Alaska, Inc. was dissolved and Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen (who are the plaintiffs in the District Court in this case at Fairbanks, Alaska) took over the assets and liabilities of Nelse Mortensen-Alaska, Inc. and went ahead with the building of the apartments as trustees of the assets of the corporation and are now copartners doing business as Nelse Mortensen-Alaska, Inc.

There was a written contract entered into on December 1, 1951 which provided that Bay View Realty Company, Cash Cole and Everett Nowell should have the management and operation of the housing project. This contract was authorized by a meeting of the board of directors held August 3, 1951 (TR 24).

This contract provided that Bay View Realty Company and Cash Cole and Everett Nowell would receive

five per cent of the total income of Fairview Development, Inc. for the management thereof, with a minimum guarantee of not less than $2,000 per month.

Cash Cole and Everett Nowell managed the apartments, collecting the rentals, always with the best interest of the project and the corporation in mind (TR 26).

The contractors, Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen, refused and neglected to pay certain obligations created in the building of the improvements, and liens were filed thereon, and otherwise breached their contract as enumerated and itemized in the cross-complaint filed herein (TR 103-132).

The contractors, Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen, refused to finish the apartments and left them in an unfinished condition, but by false affidavits collected from the F.H.A. guaranteed loan the full contract price of $3,080,000 (TR 128, 129, 144). Cash Cole and Everett Nowell, as Bay View Realty Company, and in their own capacity while managing the property, were forced to make very large expenditures to finish the project and make it habitable and rentable (TR 145).

A controversy arose wherein a suit was filed in the State of Washington against Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen. Then, a bitter feeling existed and Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen filed this case in the District Court for the Territory of Alaska against Cash Cole, Everett Nowell and Bay View Realty Company.

This suit came on for trial and Cash Cole, quite an elderly gentleman, suffered a severe heart attack soon after the trial started and the case was continued from day to day; while Mr. Cole was confined to his bed, incapacitated from doing any business, and in violation of the doctors' orders, a man, posing as his friend, to wit: W. A. Rushlight, while working in connection with the plaintiffs, went into his apartment and persuaded Cash Cole to sign a contract of settlement (TR 38) upon which a decree was entered in the District Court at Fairbanks, Alaska (TR 45), and a note to W. A. Rushlight for $25,000 was also signed.

The affidavit of the physician taking care of Cash Cole shows that he was incapable of making a valid contract at the time; could not see to read at all, due to the medication he was taking, which dilated his eyes.

This contract as made was confiscatory of Cash Cole's interest in the property and impossible of performance, was known to be impossible of performance when it was entered by persons procuring it, Nelse Mortensen, Cliff Mortensen and Frank V. Hendersen, as well as W. A. Rushlight (TR 140-142).

When Cash Cole improved in health enough and was able to read and understand the contract, he immediately applied to the District Court at Fairbanks to have the stipulation and judgment set aside and vacated on the grounds of its fraudulent procurement and his absolute inability to make a contract at the time it was signed (TR 52). This was all sup-

ported by many affidavits, and an answer and cross-complaint was lodged with the Court with a request to permit it to be filed (TR 103).

W. A. Rushlight, who posed as a friend to Cash Cole, procured his signature thereto, when Cash Cole could not see to read at all, this fact being known to Rushlight, was signed in Cash Cole's bedroom when he and Rushlight were alone therein.

Cash Cole's physical condition was supported by an affidavit from Dr. Joseph M. Ribar, M. D., showing his disabilities (TR 94).

The application for relief from the judgment followed, and was based upon Rule 60 of the Federal Rules of Civil Procedure, was supported by many affidavits, and the plaintiffs answered with many affidavits, and this man, W. A. Rushlight, came in with his affidavits supporting the plaintiffs in opposition to the motion to vacate the judgment. This creating an issue of wide variance, and without a semblance of a trial, the Honorable Harry E. Pratt, the then district judge at Fairbanks, overruled the motion to vacate and refused to set aside the judgment; sustained the motion for the appointment of a receiver; made an order forfeiting to the plaintiffs all of the stock in the Fairview Development Company owned by the defendants which amounted to a judgment in some sort of penalty or forfeiture against the defendants, to the extent of many thousands of dollars.

This may seem unbelievable, but we call your attention to the judgment itself (TR 252), and that is exactly what the Court did without a trial of any

kind, and we contend this amounted *to deprivation of property without due process of law.*

It will also be noted that the order appointing a receiver and the forfeiture order was made in a case that was closed and which the Court refused to open, and this separate judgment was rendered over and above the final judgment (TR 45). This later judgment of forfeiture and by the appointment of a receiver who was put into possession dispossessed Cash Cole and his wife, who were residing in the building, managing the apartments, which receiver remained long enough to force Cash Cole and his wife out by orders of the Court. Then, the receivership was vacated and the building and properties, including the stock of the defendants, was all turned over to the plaintiffs, who have possession of the apartments now, and Cash Cole is renting a place to live. This amounted to taking the life savings of Cash Cole and his wife without a trial. And, the breaching, destroying and ignoring of a valid contract of management of the apartments without even giving the contract any consideration whatsoever.

This judgment was affirmed by the United States Court of Appeals, Ninth Circuit. We contend this to be a direct violation of the Fifth Amendment to the Constitution of the United States; was the act of a federal Court. Petitioners contend they are entitled to a writ of certiorari directed to the United States Court of Appeals, Ninth Circuit, at San Francisco, California; that the judgment in the lower Court, affirmed in the appellate Court, is in conflict

with the decisions of other Circuit Courts of Appeal in the United States and the decisions of the United States Supreme Court.

REASONS FOR GRANTING THE WRIT.

FIRST REASON.

The Court erred in directing and enforcing the transfer and delivery of the stock certificates of Cash Cole, Everett Nowell and Bay View Realty, Inc. to the plaintiffs. This was a final judgment and was based upon affidavits alone with no semblance of a trial. Without the right of cross-examination and without the right of being confronted by the witnesses, this judgment was based solely upon a motion shown at transcript page 373. The statements therein made have been denied by affidavits of the defendants. This amounted to a foreclosure of a contract that the plaintiffs claimed had been violated and the defendants denying that they had violated it; also alleged fraud in procuring the contract as well as the fact that Cash Cole was unable to make a valid contract at the time the stipulation was executed, which made an issue for trial.

SECOND REASON.

The Court made a final order appointing a receiver, dispossessing the defendants, cancelling and annulling their written contract of management (or ignoring it), and this final order and judgment was based solely

upon affidavits, which were all contradicted by many other affidavits, with no evidence introduced, no trial being had; without the right of the defendants to cross-examine the witnesses who made the affidavits; without right to be confronted with the witnesses; without an opportunity afforded defendants to produce their evidence in the case.

This judgment has been upheld in its entirety by the United States Circuit Court of Appeals, Ninth Circuit, as shown by the opinion, the petition for a rehearing, and the order denying same, which are set out in the appendix and by reference made a part of this petition for writ of certiorari.

Each of these judgments and decisions are in direct conflict with the decisions of this Honorable Court and the Circuit Courts of Appeals of other divisions, as shown by the following citations and quotations, to wit:

Burton et al. v. Platter, 53 Fed. Rep. 901 (8th Cir.).

Quoting from pages 903 and 904, the pertinent portion of the opinion is:

> "Sanborn, Circuit Judge (after stating the facts). It is a principle that lies at the foundation of all just government that no man shall be deprived of his life, liberty, or property without due process of law. Every disregard of this principle by courts, legislatures, or citizens tends directly towards distrust, insecurity, disorder, and anarchy. It may be difficult, perhaps impracticable, to give a definition of 'due process of law' which would comprehend all cases as they arise, and

it is certainly unnecessary to do so. Chancellor Kent says: 'The better and larger definition of "due process of law" is that it means law in its regular administration through courts of justice.' 2 Kent, Comm. 13. Certain it is that, in judicial proceedings, due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, *and renders judgment only after trial.*" (Emphasis ours.)

Also, *United States et al. v. Abilene & S. Ry. Co. et al.,* 265 U.S. 274, 44 Supreme Court Reporter 565, and quoting from the body of the opinion on page 569 as follows:

"But a finding without evidence is beyond the power of the Commission * * * Nothing can be treated as evidence which is not introduced as such."

The United States Court of Appeals for the District of Columbia, in the case of *Clarksburg-Columbus Short Route B. Co. v. Woodring et al.,* 89 Fed. Rep. 2d 788. Quoting from page 790, in the body of the opinion, as follows:

"The right to notice and hearing is imperative in judicial or quasi-judicial proceedings. It is not important that in this instance a hearing

> is not expressly enjoined by the statute. *The right is constitutional, and the deprivation of the citizen of his property without notice and an opportunity to be heard amounts to the taking of his property without due process of law.* * * * But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If upon the facts alleged the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside."

We feel that the case of *Palko v. Connecticut,* 302 U.S. 319, is in point, especially on the following statement quoted from page 327:

> "Fundamental too in the concept of due process, and so in that of liberty, is the thought that condemnation shall be rendered only after trial. Scott v. McNeal, 154 U.S. 34; Blackmer v. United States, 284 U.S. 421. The hearing, moreover, *must be a real one, not a sham or a pretense.* Moore v. Dempsey, 261 U.S. 86; Mooney v. Holohan, 294 U.S. 103." (Emphasis ours.)

The case of *Fiske v. Buder,* 125 Fed. 2d 841, includes a statement supporting our contention, here quoting from page 849:

> "* * * It is the rule that fraud is extrinsic or collateral within the meaning of the rule when its effect is to prevent an unsuccessful party from having a trial or from fully presenting his case * * *"

THIRD REASON.

The Court erred in denying the defendant's motion to vacate the judgment rendered on the stipulation, when this motion was supported by a large number of affidavits showing facts that constituted fraud on the part of the plaintiffs in procuring the execution of the stipulation and the judgment. In support of this position, these petitioners represent to this Honorable Court that the proceedings of the District Court show clearly that its judgment and findings of fact are not based upon a court trial, but are based solely upon the affidavits of the plaintiffs disregarding and ignoring the affidavits of the defendants; no witness was called, no testimony taken upon said motions; and the defendants were denied a trial, and their motion to reopen the judgment and file the amended answer and cross-complaint was denied, a receiver appointed and an order made depriving the defendants of their undivided one-half interest in this large apartment project, which cost $3,080,000, on which payments of $21,690.16 each month had been made by the management from the time of its commencement of operation to the time the receiver was appointed which amounted to many thousands of dollars.

We feel that the rule upheld in the case of *Assman v. Fleming,* 159 Fed. 2d 332 (8th Cir.), is the majority and almost unanimous rule, quoting from page 336:

> "(4-7) This rule is substantially the same as the statutory provision of California, Minnesota, New York, and several other states. The proceeding

> by motion to vacate a judgment is not an independent suit in equity but a legal remedy in a court of law; yet the relief is equitable in character and must be administered upon equitable principles. Fraud and circumvention in obtaining a judgment are ordinarily sufficient grounds for vacating a judgment, particularly if the party was prevented from presenting the merits of his case."

For sake of brevity, we state our contention that the Court erred in appointing a receiver for Fairview Manor which was a final judgment dispossessing these petitioners, taking their property without a trial, and denying them any relief, and in support of this position we call your attention to our original brief, filed before the Circuit Court of Appeals, commencing on page 62 and extending down to page 74, which is now before this Honorable Court, and the cases cited therein uphold this contention.

CONCLUSION.

In conclusion, your petitioners respectfully submit that this petition for a writ of certiorari should be granted.

The judgment as it now stands takes away from Cash Cole and Bay View Realty valuable stock that has been their property from the beginning of the corporation, and this was done without a trial, without being confronted by witnesses, without the privilege of cross-examination, and the final judgment taking this stock away and appointing a receiver, dis-

possessing Cash Cole and his wife from the premises, was based solely on affidavits that were denied and contradicted in each and every allegation. Without the plaintiffs using or introducing a word of competent testimony on their behalf, they have taken this property away from Cash Cole and the other petitioners herein, have broken and ignored the solemn written contract for management of the apartments, have browbeaten Cash Cole and his wife by throwing them out of the apartments by orders of the Court, have taken his corporate stock without a trial, and we can think of no case, anywhere, where such an act has been upheld in any Court of Appeals in the United States.

We still have faith in, and rely upon, the Constitution and laws of the United States and, with confidence we trust that this Honorable Court will allow certiorari and correct this tragedy upon which we humbly submit this, our petition.

Dated, Anchorage, Alaska,
January 26, 1956.

Respectfully submitted,
BAILEY E. BELL,
Attorney for Petitioners.

WILLIAM H. SANDERS,
JAMES K. TALLMAN,
Of Counsel.

(Appendix Follows.)

Appendix

Transcript of Record in Two Volumes in the Supreme Court of the United States

October Term, 1955

No.

Cash Cole, et al.,
Petitioners,
vs.
Fairview Development, Inc., et al.,
Respondents.

VOLUME II.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

(Proceedings had in the United States Court of Appeals for the Ninth Circuit)

United States Court of Appeal
for the Ninth Circuit

Excerpt from Proceedings of Tuesday, September 6, 1955.

Before: Healy, Pope and Fee, Circuit Judges.

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Bailey E. Bell, counsel for the appellants, and by Mr. Walter Sczudlo, counsel for the appellees, and submitted to the Court for consideration and decision.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Tuesday,
September 29, 1955.

Before: Healy, Pope and Fee, Circuit Judges.

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

United States Court of Appeals
for the Ninth Circuit

Cash Cole, et al., Appellants, vs. Fairview Development, Inc., et al., Appellees.	No. 14,424 Sep. 29, 1955

Appeal from the United States District Court for the District of Alaska, Fourth Division

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OPINION

Before: Healy, Pope, and Fee, Circuit Judges

Per Curiam

This litigation was begun against appellants as a stockholders' suit. The principal defendant was appellant Cole, the others joined being more or less nominal parties. Subsequent to the commencement of the trial a written stipulation was entered into settling all claims of the parties, and a final judgment approving the settlement was entered by the trial court. Able and reputable counsel in charge of appellants' defense participated in the negotiations and in the making of the compromise. The record indicates that these counsel kept appellant Cole and his family advised of the course of the negotiations and of the result.

Some three months after entry of the judgment appellants, through other counsel employed by Cole,

moved under Rule 60(b) of the Federal Rules to set aside the compromise stipulation and to vacate the judgment. Most of the grounds set out in the Rule were incorporated in the motion plus additional grounds asserting the mental incapacity of appellant Cole and the alleged confiscatory nature of the settlement. Affidavits were filed contemporaneously with and in support of the motion, and there was a counter-showing by affidavits interposed on the part of appellees. Oral argument was had, the motion was taken under advisement, and was subsequently denied by the court. This appeal followed.

The original suit presented a complicated factual situation. No useful purpose would be served by discussion of the facts or the alleged merits of the appeal. Under the Rule a refusal to vacate is within the discretion of the trial court and may be reversed only for abuse of that discretion. Certainly, considering the showing pro and con here, no abuse of discretion is discernible, nor was error committed in the procedure followed. The trial court's ruling on the motion is accordingly affirmed.

(Endorsed:) Per Curiam Opinion. Filed Sep. 29, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 14,424

Cash Cole, et al.,
Appellants,

vs.

Fairview Development, Inc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the District of Alaska, Fourth Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska, Fourth Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: September 29, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Wednesday,
December 7, 1955

Before: Healy, Pope and Fee, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellants, filed October 27, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.